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IN THE

Supreme Court of the United States

October Term 1967
No. 413

GORDON A. ROGERS,

Petitioner,

vs.

ROBERT J. ZINGHEIM,

Respondent.

Petition for a Writ of Certiorari to the District Court of Appeal, Fourth Appellate District, State of California.

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Petition for a Writ of Certiorari to the District Court of Appeal, Fourth Appellate District, State of California.

Jurisdiction.

This is a petition of Gordon A. Rogers for Writ of Certiorari to review a judgment of The District Court of Appeal, Fourth Appellate District, State of California, Division One, entered on March 27, 1967, affirming that portion of the judgment made and entered by The Superior Court of the State of California in and for the County of San Diego, on June 10, 1965, awarding the amount of $29,689.04 in money damages against petitioner Rogers. The Supreme Court of the State of California denied a hearing to petitioner on May 24, 1967.

Jurisdiction of this Court is involved under U.S.C.A., Const. Amend. 14, Section 1, and Sup. Ct. Rule 19, 28 U.S.C.A.

Citations to Opinions Below.

Supreme Court of California. Order filed May 24, 1967 denying petition for hearing set forth in Appendix A. No opinion.

Court of Appeal. Opinion filed and judgment entered on March 27, 1967 set forth in Appendix B. Reported 57 Cal. Rptr. 809.

Superior Court. Unreported oral opinion set forth in Appendix C. Judgment filed and entered on June 10, 1965, #275082.

Statement of Facts.

Station XEMO was a commercial radio broadcasting station in Tijuana, Mexico. The station was licensed under Mexican law to one Ferreira, now deceased, a Mexican national. Respondent Zingheim, a United States citizen, living in San Diego, entered into an "arrangement" with Ferreira whereby the latter "sold" Station XEMO to the former. However, Ferreira retained all indicia of ownership, including the license.

Under Mexican law, only a Mexican national of native birth or a Mexican corporation whose shares have been issued only to Mexican nationals, may hold such a license.

On November 24, 1958, respondent agreed under written contract with one Marshall to sell him Station XEMO, together with agency rights in San Diego and sundry equipment. Petitioner Rogers guaranteed the contract. Marshall and petitioner are United States citizens, not Mexican nationals. Ferreira executed an endorsement to this contract whereby he undertook to be bound by its terms.

The contract provided that Radio Station XEMO was to be transferred to such person of Mexican nationality or such Mexican corporation, as Marshall shall designate.

The contract provided further that the Superior Court of the State of California would be the sole and exclusive forum for the trial of any issues but that "if any part of this agreement is contrary to the laws of the Republic of Mexico, then such part is void and of no effect". (See Appendix D).

On April 1, 1960, a fire destroyed the buildings housing Station XEMO. After November 1960, Marshall made no payments under his contract of Novembr 24, 1958 with respondent.

On January 27, 1960, respondent filed suit (#240878) in the Superior Court in San Diego, California, against Marshall *only* to recover delinquent payments under the contract. Marshall cross-complained alleging illegality of the contract under the applicable Mexican law, which issue was entertained, but rejected by the Court without comment in a memorandum opin-

ion. Judgment was entered against Marshall on January 12, 1962 in the sum of $3,600.00, and costs.

Following award of the foregoing judgment to respondent, he filed an action for money damages against petitioner only in the Municipal Court, San Diego, California, for the sum of $3,600.00, which represented the delinquent payments on the contract. Petitioner was not a signatory to the instrument, but he had guaranteed payment thereon. This case was subsequently transferred to the Superior Court in San Diego prior to trial where judgment was awarded for petitioner, in the amount of $3,600.00 (#275082).

Respondent also filed in the Superior Court in San Diego an action (#262878) against petitioner and Marshall for money damages in the amount of $40,000.00, representing the unpaid balance of the purchase price under the contract. After trial, the court rendered judgment against petitioner and Marshall in the sum of $29,689.14 for the unpaid balance of the purchase price and the sum of $9,896.00 in attorneys' fees. The California Court of Appeals affirmed the judgment, except as to the amount of the attorneys' fees awarded, which were substantially reduced.

These cases were consolidated #262878 and #275082 for trial in the Superior Court. At the outset of the trial, the court ruled that the issue of the contract's illegality was foreclosed by prior adjudication in the Superior Court case against Marshall (#240878). Again, before the commencement of trial, defendants

offered to introduce evidence that the contract in issue was illegal under Mexican law and should therefore be held void in the present action. The court, however, sustained plaintiff's objection to this offer of proof by defendants under the doctrine of *res judicata.*

Petitioner thereupon duly filed a petition for hearing with the California Supreme Court. This petition was denied on April 24, 1967.

Petitioner Rogers now files this Writ of Certiorari on the question of whether the ruling of the Superior Court in the case against Marshall (#240878), in which petitioner was not named as a defendant or party, could properly dispose of the question of the contract's validity in the subsequent cases (#275082 and #262878), as held by the California District Court of Appeal.

Question Presented.

Does denial of due process exist where litigant is barred by Appellate Court from raising defense of invalid foreign contract under the doctrine of *res judicata* applied by Trial Court to proceedings in a court where the litigant was not a party?

REASONS FOR GRANTING THE WRIT.

I.

Conflict of Laws.

One of the basic rules in the field of conflicts of law that the laws of the State most substantially connected with the contract and transaction will generally govern.

In determining the applicable law, courts will consider which state's or foreign country's total relationship with the transaction is most significant. Factors to be considered in this connection include the location of the subject matter of the contract, the location of the place of business and incorporation, and place of negotiating, contracting and performance.

Vanston Committee v. Green, et al., 329 U.S. 156, 162 (1946);

Frankel v. Johns-Mansville Corp., 257 F. 2d 508 (1958);

In re Kippel's Estate, 7 Wis. 2d 335 (1959);

Goodrich, Conflict of Laws, 4th Ed. (1964), pp. 204-205;

Weintraub, Contracts and the Conflict of Laws, 46 Iowa Review 713 (1961).

Radio station XEMO, the principal property subject to the contract, is located in Tijuana, Mexico, and the licensee and owner of the station was a resident and citizen of Mexico. Substantial performance of the contract would necessarily occur in Mexico from where the aforesaid station would broadcast, and where its properties are located. Such facts seem to compel the conclusion that Mexico, rather than California, is more closely connected with the present contract and transac-

tion, and that Mexico clearly has a predominant interest therein.

Added to the weight of the foregoing circumstances is the provision in the contract requiring application of Mexican law. It is provided that the Superior Court of California is the sole and exclusive forum for trial of any issues arising under the contract; however, it is further provided that, if any part of the contract is contrary to the laws of Mexico, such part becomes void and of no effect. (See Appendix D, p. 26).

Where the parties concede applicability of the invalidating foreign law, such law will generally govern the contract. *Signal Oil & Gas Co. v. Ashland Oil & Refining Co.*, 314 P. 2d 62, modified on other grounds 332 P. 2d 1 (1958).

The frequently followed "Renvoi doctrine", which refers to the law of another state in a contract, is to select the law applicable to the contract for its solution is primarily to achieve a result which is not dictated by the fortuitous choice of forum. *Goodrich, supra,* Note 36; *Life & Fire Ins. of N.Y. v. Adams,* 34 U.S. 571 (1835). Based upon the complete record of this case it seems not unreasonable to believe that respondent was attempting to achieve results in the California courts not available to him in Mexican Courts because of the illegal character of the contract.

That Mexican law clearly prohibits transfer or issuance of licenses for commercial radio stations to individuals who are not Mexican by birth or to non-Mexican companies is undisputed by the parties to this controversy herein. The opinion of the California Court of Appeals indicates that both the appellate and

trial court took judicial notice that the contract in question was contrary to Mexican law. See also, *General Communications Laws of Mexico,* Chapter 6, Article 43, which provides as follows:

> "Licenses for commercial radio stations may solely be issued to persons who are Mexican citizens by birth or to Mexican companies * * *. Once a license is issued, the partial or total assignment or alienation of the same license or of shares of participants as associates of the licensed company to a foreign subject shall be ground for forfeiture, aside from the grounds enumerated in this law * * *".

Ferreira, the licensee and owner of Station XEMO, located in Mexico, was the only Mexican national related to the transaction to which the station was subject. No contention has been made at any point in the proceedings below that petitioner, respondent or Marshall was a Mexican national. That Ferreira expressly agreed to be bound by a contract void under Mexican law did not thereby validate it. If Ferreira had transferred the license, as provided in the agreement, to a Mexican nominee of Rogers, it is still doubtful that this would have legalized the contract; however, the fact remains that no such transfer was executed.

II.
Res Judicata.

Petitioner Rogers was not a party or named as a defendant in the Superior Court trial #240870 brought by respondent against Marshall only. In that action the Court summarily ejected as being without merit Marshall's assertion that the contract of January 24, 1958 was illegal. The Court submitted no grounds, or gave any comments or explanation in support of its position.

It was error on the part of the Court of Appeal to sustain the Superior Courts refusal to entertain in the two subsequent, consolidated cases (#275082 and #262875), petitioner's offer of proof made before and at trial, as to the illegality of the contract. Applying the doctrine of *res judicata,* the Superior Court held that the respondent in the earlier case, also in the Superior Court (#240878), had secured an adjudication that the contract of January 24, 1958 was legal, and that the petitioner was foreclosed from raising this issue, even though he was not a party to the earlier proceeding.

This court has held that a non-party who was not named in the prior adjudication is not bound thereby, even though an interest existed in securing a favorable decision on the questions involved and even though the non-party contributed to the expenses of the prior litigation. *Litchfield v. Crane,* 123 U.S. 549. It has also been held by this court that a non-party who supplies counsel to the prior litigant is not bound when not formally a party unless the evidence shows that he had "the laboring oar" in a prior suit. *Drummond v. United States,* 324 U.S. 316, 318.

III.

Due Process.

It has been held that a State violates the Due Process clause of the 14th Amendment if it applies its laws to circumstances over which it has no legislative jurisdiction. *Holmes Insurance Co. v. Dick,* 281 U.S. 397 (1930). It is immaterial that the Federal question was not raised in the state trial court, where such question was passed on by the state appellate courts, *Holmes v. Dick, supra.*

In this Writ it appears that the Petitioner, based upon the above authority, was deprived of procedural due process. Neither at the trial level, nor at the state appellate level was he permitted to offer proof of the illegality under Mexican law of the contract of January 24, 1958. Based also upon the *Holmes, supra,* failure to take an appeal from the trial court ruling (Case #240878) where Petitioner was a Guarantor under the contract in issue would not foreclose him from his subsequent appeal on the Federal question to the California District of the Court of Appeal or to the California Supreme Court. In being prevented, therefore, to place the issue of the illegality of the January 24 contract before the California courts, Petitioner was precluded from securing a ruling on the merits.

For further rulings by this Court pertaining to deprivation of property without due cause see *Aetna Life Insurance Co. v. Druiken,* 266 U.S. 389 (1924), *New York Life Insurance Co. v. Dodge,* 246 U.S. 357 (1918).

IV.

Comity.

Where a contract violates the law of a friendly nation such as Mexico, if is contended that decisions enforcing such contracts be stricken down on grounds of comity. Such contracts should not be given the stamp of approval by a California court and thereby flout Mexico's primary concern in the subject matter. California courts should deny relief for reasons of comity where it seems clear that a contract was made to circumvent Mexico law.

Corbin on Contracts, Vol. 6A, Illegal Bargains, at page 750, states:

> "It may be noted, however, that on grounds of comity and national welfare a bargain is now held to be illegal if it is made for a purpose that is in violation of the law of another state or friendly nation."

Conclusion.

For the foregoing reasons, this petition should be granted.

Respectfully submitted,

FIZZOLIO & FIZZOLIO,

By EDWARD R. MINOR,

Counsel for Petitioners.

APPENDIX A

Order Denying Hearing After Judgment by the Court of Appeal.

In the Supreme Court of the State of California, in Bank.

4th District, Division 1, Civil No. 8151, 8152.

Zingheim v. Marshall et al.

Zingheim v. Rogers.

Appellants' petition for hearing DENIED.

Filed May 24, 1967.

Traynor, *Chief Justice*

APPENDIX B.

Opinion of the Court of Appeal.

In the Court of Appeal, Fourth Appellate District, Division One, State of California.

Robert J. Zingheim, Plaintiff and Respondent, v. Robert S. Marshall and Gordon A. Rogers, Defendants and Appellants. 4 Civil No. 8151.

Robert J. Zingheim, Plaintiff and Respondent, v. Gordon A. Rogers, Defendant and Appellant. 4 Civil No. 8152.

Filed Mar. 27, 1967.

Appeals from two judgments of the Superior Court of San Diego County. William P. Mahedy, Judge. Affirmed in part and reversed in part, with directions.

Fizzolio & Fizzolio and Edward L. Lascher for Defendants and Appellants.

Kimball, Jones & Kelly for Plaintiff and Respondent.

Appeals have been taken in two actions consolidated for trial; separate judgments were given based upon separate findings of fact. In both actions plaintiff recovered judgment: in action #275082 against Gordon A. Rogers (Rogers), and in action #262878 against Robert S. Marshall (Marshall) and Rogers. Both defendants have appealed.

FACTS IN SUPPORT OF JUDGMENTS

Prior to November 24, 1958, plaintiff operated commercial radio broadcasting station XEMO in Tijuana, Mexico. The station was licensed under Mexican law to one Fernando Ferreira (Ferreira), a Mexican national. Under Mexican law, only a Mexican national

of native birth or a Mexican corporation whose shares have been issued only to Mexican nationals may hold such a license.

At the same time plaintiff operated an agency with a San Diego office for the sale of advertising time on XEMO.

On October 20, 1958, plaintiff gave a 30-day option to Rogers and four other persons not party to the present litigation to purchase the agency and the physical equipment of XEMO.

Before the expiration of the option period, Rogers communicated with plaintiff not for the purpose of exercising the option but to arrange to purchase the agency and XEMO for himself.

A written agreement was prepared by plaintiff's attorney by which plaintiff agreed to sell the agency, all accounts receivable and XEMO to Marshall, who was acting for Rogers, who did not wish his name to appear in the agreement. Originally the agreement was dated November 20, but that date was changed to November 24, on which date it was signed. Rogers said he did not wish the date of November 20, because it was too close to the option expiration date.

The agreement contained the following provisions:

> "Radio Station XEMO in Tijuana, Baja California, Republic of Mexico, is presently in the name of Fernando Federico Ferreira, and shall be transferred to such person of Mexican nationality or such Mexican Corporation as Robert S. Marshall shall designate.
>
> ". . .